IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JOHN Q. HAMMONS HOTELS, INC. and JOHN Q. HAMMONS, L.P., Plaintiffs, vs. ACORN WINDOW SYSTEMS, INC., and NABHOLZ CONSTRUCTION CORPORATION, Defendants.	No. C01-0151 **ORDER**

This matter comes before the court pursuant to the defendant Acorn Window Systems, Inc.'s August 4, 2003 motion for summary judgment (docket number 68) and defendant Nabholz Construction Corporation's August 4, 2003 motion for summary judgment (docket number 69). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 29 U.S.C. § 636(c). For the reasons set forth below, the motions are granted.

In this case, the plaintiffs, John Q. Hammons Hotels, Inc. and John Q. Hammons Hotels, L.P., allege that Acorn Window Systems, Inc. (Acorn) designed, manufactured, assembled, and delivered defective windows that were installed at the plaintiffs' hotel, the Collins Plaza Hotel. These allegations form the basis for the plaintiffs' claims against Acorn for express warranty, implied warranty, negligence, strict liability, breach of contract, and negligent misrepresentation. Third-party plaintiff Acorn filed its third-party

complaint against Nabholz Construction Corporation (Nabholz), the general contractor for the construction of the hotel, on July 8, 2002. Acorn seeks indemnity and contribution against Nabholz for any damages it is forced to pay as a result of the claims asserted against it by the plaintiffs. The plaintiffs sought leave to assert a claim against Nabholz on November 12, 2002 and this court granted that application on December 2, 2002. The plaintiffs have asserted claims against Nabholz for breach of contract and for negligence. The specifications in the amended complaint focus on the allegedly defective windows and the installation of the exterior insulation finish system at the Collins Plaza Hotel.

Acorn moves for summary judgment, arguing: (1) the plaintiffs' claims are barred by the applicable statutes of limitation; (2) the plaintiffs have failed to state a claim for breach of contract; (3) the plaintiffs have failed to state a claim for breach of warranty; (4) the plaintiffs have failed to state a claim for negligent misrepresentation; and (5) the insurance policies limit the damages available to the plaintiffs. Nabholz moves for summary judgment, arguing: (1) the plaintiffs' claim for breach of contract fails for a lack of evidence; (2) the plaintiffs' claims against it are time-barred; (3) the plaintiffs' negligence claim is prohibited by the economic loss doctrine; and (4) Acorn's claims for indemnity and contribution should be dismissed. Acorn filed a "Joinder in Nabholz's Summary Judgment Motion Regarding Economic Loss Doctrine" on August 13, 2003.

Summary Judgment: The Standard

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v.

Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id.

Statement of Material Facts

The plaintiffs' claims are based on water infiltration, damage and resulting repairs at the Collins Plaza Hotel located in Cedar Rapids, Iowa. The plaintiffs' hotel was completed in 1988 and at least some of the windows which form the basis of the plaintiffs' claims were delivered and installed in 1987. The general contractor for the hotel was Nabholz. The plaintiffs have alleged that water has entered the building in two ways: they claim that the defendants produced and installed windows that were defective as a result of a process called "thermal break shrinkage" in polyurethane thermal breaks; and various problems involving the installation of exterior cladding of the hotel referred to as the exterior insulation finish system (EIFS).

No written contracts have been produced between the plaintiffs and Nabholz for the construction of the hotel or between the plaintiffs and Acorn. No written contract or warranties have been produced as to Nabholz and Acorn. The plaintiffs allege that on June 15, 1987, they entered into a written contract with Nabholz. The plaintiffs also allege that relevant portions of that written contract were recently produced by a subcontractor that worked as an agent for the plaintiffs and Nabholz.

As the general contractor, Nabholz was responsible for receiving warranties, diagrams, operation manuals, construction plans and other documents relating to the hotel, and turning them over to the plaintiffs after completion of construction. Nabholz also had one or two employees on site who oversaw construction. During construction of the hotel, Nabholz entered into a written contract with Swanson Glass for the furnishing of glass, glazing, and window installation. The plaintiffs allege that under the terms of the contract between the plaintiffs and Nabholz and the contract between Nabholz and Swanson Glass, the windows were warranted to comply with all constructive specifications of the hotel, comply with the industry standard, and that all warranties and remedies required by the construction contract and by law would be provided.

Nabholz made the decision to use Acorn A-Therm 2500 Series Horizontal Sliding Windows that were manufactured by Acorn's predecessor corporation.[1] The plaintiffs claim that Nabholz directed its subcontractor, Swanson Glass, to obtain an offer for purchase of windows from Acorn, and to forward that offer to Nabholz so Nabholz could present the offer to the plaintiffs. The plaintiffs claim that in determining whether to approve the bid submitted by Acorn for the windows, they relied on an advertising brochure indicating that the windows would be constructed of aluminum alloy split with "a structural A-THERM thermal barrier in accordance with [Acorn] engineering standards and drawings," and would exceed A.A.M.A. specifications and that the windows would "insure proper weathering" and that Acorn warranted the workmanship and materials for two years. Nabholz submitted to Swanson Glass its approval of the window shop drawings on November 2, 1987. Swanson Glass began ordering windows from Acorn for installation in the Collins Plaza Hotel on November 5, 1987. Swanson Glass installed the windows purchased from Acorn in the Collins Plaza Hotel and installation was completed by October 4, 1988.

[1] In an order dated February 11, 2003, this court denied Acorn's motion for summary judgment and held there was a genuine issue of material fact as to whether Acorn may be held liable as a successor corporation.

The plaintiffs' architect indicated that under industry standards, the window units should have a useful life of at least 25 years during which period the windows would not leak and the thermal barrier would remain fully effective. The defendants deny that there is any evidence as to the useful service life of windows manufactured in 1987 or that any such provision was discussed or incorporated into any oral or written contract between any of the parties in this case or with Swanson Glass.

Sometime before 1991, some of the windows in the Collins Plaza Hotel were leaking water when it rained. Employees used towels to clean up the water. In the early to mid-1990s, employees began to notice pink discoloration on the wallpaper in a number of rooms. The spots were a result of mold caused by water infiltration into the wall system. The spots were eradicated by removing the vinyl from the walls, applying bleach, and replacing the vinyl. The spots first appeared on walls that had no windows. At around the same time, guests and employees of the hotel were aware that when it would rain, water would flow through the windows and pool in the window sills. Employees were also aware of some hotel guest complaints regarding water intrusion, musty smells, and mold in certain guest rooms and certain areas of sales and catering. The plaintiffs claim this water intrusion was unrelated to the thermal break shrinkage in the windows, the improper installation of the windows, or the problems with the building exterior EIFS that caused the water intrusion at issue in this case. The plaintiffs allege these instances of water intrusion were isolated and resulted from a series of sloped areas where the sealant placed over an aesthetic joint had failed and allowed water to accumulate in the EIFS and migrate down a plain wall without windows to the first and second level.

In the early 1990s, attempts were made to modify the windows. Part of the window sill was cut to allow more water to flow off the sill instead of into the wall system and sealant was used to block part of the internal window chamber. The sealant injection was done in many of the plaintiffs' other hotels within the same time frame. The repair attempts were performed on many of the windows, however, it is unclear who actually performed the repairs. The modifications to the windows was a type of project that, in

general, would have been brought to the attention of the plaintiffs' corporate home office. However, the plaintiffs claim they had no knowledge of repairs performed on Acorn windows at the Collins Plaza Hotel and they were never billed for any of these repairs.

From 1990-92, the plaintiffs' employees were also aware that the hotel experienced water leakage in the Cedar Rapids Room. This leakage was repaired by the installation of a gutter system. The plaintiffs claim these instances of water intrusion are also unrelated to the water intrusion through the windows and EIFS at issue in this lawsuit because the Cedar Rapids Room is housed in a one-story structure that would not have been influenced by the windows and EIFS around the window in the main hotel tower.

The plaintiffs claim that employees first noticed that water seemed to be infiltrating through the window system and surrounding EIFS in the summer of 1998. The plaintiffs allege the Acorn windows experienced a phenomena called "thermal break shrinkage." This results when the polyurethane thermal break that prevents transfer of heat or cold from the outside portion of the window to the inside portion and provides a moisture barrier shrinks from exposure to heat. The shrinkage allows water to enter the window chamber and the wall system.

In October of 1998, the plaintiffs hired R.J. Kenney to investigate and remedy water intrusion problems at the Collins Plaza Hotel. From October 28 through October 30, 1998, R.J. Kenney conducted a two-day preliminary investigation of the window and exterior wall system to determine the condition of the EIFS and the window system and to identify the source of any water intrusion. R.J. Kenney concluded that water was able to infiltrate through the windows and into the interior of the walls of the hotel as a result of shrinkage of the thermal break window frames and this water intrusion caused failures with the sealant joint of the EIFS that cladded the building exterior. R.J. Kenney also discovered that two previous attempts to repair the windows were made sometime between 1990 and 1993. The plaintiffs have no record of the repairs and were not billed for the repairs. R.J. Kenney concluded the repairs were performed by Acorn's predecessor corporation to correct a thermal break shrinkage problem that would have been known to it but of which the plaintiffs

claim to have no knowledge. R.J. Kenney indicated the repairs discovered were similar to repairs seen at some of the plaintiffs' other hotels performed to cure a thermal break shrinkage problem. The manufacturer of the windows at the plaintiffs' other hotels was not Acorn. R.J. Kenney found that the only means of repairing the damage was to tear out and repair affected walls, to repair or replace the Acorn window units, and to repair the sealant joint problems in the EIFS. Further, R.J. Kenney opined and that 10% of the damage caused by shrinkage of the sill receptor would have occurred during the time period of 1988-90, and 30% of the damage during the time period of 1990-93.

In 1999, the plaintiffs engaged in an extensive project to repair the exterior of the hotel and many of the guest rooms which sustained water damage. The plaintiffs also repaired or modified all of the Acorn windows in the hotel. These repairs were completed on or about December 18, 2000.

On June 9, 2000, the plaintiffs learned that Acorn was in bankruptcy. The plaintiffs sent a letter to the Clerk of the Bankruptcy Court and a letter to Acorn concerning their claims arising from the design, manufacture, assembly and delivery of the window units. On October 12, 2001, the Bankruptcy Court entered an Order based upon an agreement reached between the plaintiffs, Acorn and the Bankruptcy Trustee that allowed the plaintiffs to file this lawsuit against Acorn and limited the plaintiffs' recovery to Acorn's available insurance proceeds.

Conclusions of Law

This case, before the court on diversity jurisdiction, is controlled by Iowa law. See Frideres v. Schiltz, 113 F.3d 897, 898 (8th Cir. 1997); Waitek v. Dalkon Shield Claimants Trust, 908 F. Supp. 672, 678 (N.D. Iowa 1995). The plaintiffs assert breach of express and implied warranty, breach of contract, negligence, strict liability, and negligent misrepresentation claims against Acorn. The plaintiffs assert breach of contract and negligence claims against Nabholz. No written contracts between any of the parties have been produced. Both Acorn and Nabholz argue that the plaintiffs' claims against them are

time-barred. The plaintiffs argue that the discovery rule applies to extend the statutes of limitation on their claims.

Statutes of limitation are "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (quoting Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944)). The Iowa Supreme Court observed that statutes of limitation strike a balance between the competing interests of the parties to a lawsuit:

> The plaintiff wishes to have a reasonable time to bring the suit in order that he [or she] may identify the various acts of negligence, the parties responsible, and the extent of his [or her] damages. The defendant, on the other hand, seeks to avoid having to defend against stale claims because witnesses' memories may fade or other evidence may be lost. The limitation period is also designed to bring repose and an end to the assertion of claims.

Borchard v. Anderson, 542 N.W.2d 247, 251 (Iowa 1996) (quoting LeBeau v. Dimig, 446 N.W.2d 800, 803 (Iowa 1989)).

The discovery rule is a judicially created exception designed to ameliorate the harsh, and sometimes unjust, results stemming from the strict application of a statute of limitations. Iowa has adopted this common law rule, recognizing that "a statute of limitations should not bar a plaintiff who is unaware of the accrual of a claim and could not have been aware of it in the exercise of reasonable diligence." LeBeau v. Dimig, 446 N.W.2d at 801 (citing Chrischilles v. Griswold, 150 N.W.2d 94, 100-01 (1967)). As a practical matter, this rule prevents the applicable statute of limitations from commencing to run until such time when a plaintiff knows, or should have known, of the injury sustained. Frideres v. Schlitz, 113 F.3d at 898-99 (discussing the Iowa discovery rule). As the Eighth Circuit Court of Appeals has observed:

> Under Iowa law, the "statute of limitations begins to run when the injured person discovers or in the exercise of reasonable care should have discovered the allegedly wrongful act." Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985).

> Actual knowledge of one's injury or claim is not required. Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351 (Iowa 1987). "The statute begins to run when the person gains knowledge sufficient to put him on inquiry." Id. Once the plaintiff gains such knowledge, the "plaintiff is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation." Id. Moreover, "the duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury." Franzen, 377 N.W.2d at 662. Rather, "[i]t is sufficient that the person be aware that a problem existed." Id.

Roth v. G.D. Searle & Co., 27 F.3d 1303, 1306 (8th Cir. 1994).

A five-year statute of limitations governs actions for breach of implied warranty and a ten-year statute of limitations governs actions for breach of written warranty. For a breach of oral contract claim, the statute of limitations is five years and for breach of a written contract, it is ten years. Iowa Code §§ 614.1(4)-(5). "In the case of a contract dispute, that right accrues and the limitations period begins running upon breach of the contract." Diggan v. Cycle Sat, Inc., 576 N.W.2d 99, 102 (Iowa 1998) (citing Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981)). For negligent misrepresentation claims concerning injury to economic and financial interest, the statute of limitations is five years. Iowa Code § 614.1(4). The statute of limitations for negligence and strict liability claims is also five years. The plaintiffs argue there was an express warranty provided and that they proved the terms of written contracts between them and Acorn and Nabholz and therefore, the ten-year statute of limitations applies to their breach of warranty and breach of contract claims.

Iowa law permits parties to reduce by agreement the statute of limitations in contracts for the sale of goods to not less than one year. Iowa Code § 554.2725(1). The discovery rule, as it applies to actions for the sale of goods, provides:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must

> await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Iowa Code § 554.2725(2). Accordingly, if an express warranty does not "explicitly" extend to future performance, there is no tolling under the discovery rule. Sudenga Indus., Inc. v. Fulton Perf. Prods., Inc., 894 F. Supp. 1235, 1238 (N.D. Iowa 1995). As it is used in the Iowa Code § 554.2725, the word "explicit" means a full clear expression being without vagueness or ambiguity, leaving nothing implied. Id. (citing City of Carlisle v. Fetzer, 381 N.W.2d 627, 629 (Iowa 1976)). The ordinary rule is that the statute of limitations in a breach of warranty action begins to run once the seller tenders the goods. Id. (citing City of Cincinnati v. Dorr-Oliver, 659 F. Supp. 259 (D. Conn. 1986)). In order to take the case out of the general rule, the express warranty must explicitly extend to future performance. Id. The terms of the warranty must unambiguously and explicitly indicate that the manufacturer is warranting the future performance of the goods for a specified period of time. Id. (citing In re Lone Star Industries, Inc., 776 F. Supp. 206, 219 (D. Md. 1991)).

Under Iowa Code § 554.2313, express warranties are created by a seller of goods as follows:

> a. Any affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the being sold creates an express warranty that the goods shall conform to the affirmation or promise.
> b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

The plaintiffs claim that under the terms of the contract between Acorn and the plaintiffs' agent, Swanson Glass, Acorn expressly warranted that the windows sold to Swanson Glass had a useful life that comported with the usage of trade, 20-25 years, and met all specifications in the written contract between the plaintiffs' agents, Nabholz and Swanson Glass. The plaintiffs also allege that Acorn expressly warranted that the windows would comport with the terms of an advertising brochure that the windows would exceed

A.A.M.A. specifications and that it warranted the workmanship and materials for two years. The plaintiffs further argue that this two-year warranty is unreasonable and void given the latent nature of the defect at issue and its period therefore must be extended by the discovery rule.

The alleged breach of warranty in this case occurred in 1987, when the windows were delivered, regardless of the plaintiffs' lack of knowledge of the breach, unless the "warranty explicitly extend[ed] to future performance of the goods and discovery of the breach must await the time of such performance," in which case the plaintiffs' cause of action occurred when the breach was or should have been discovered. The court has examined the plaintiffs' allegations concerning the alleged express warranties and extension of those warranties. The only documents pointed out by the plaintiffs are the contract between Nabholz and Swanson Glass and Acorn's advertising brochure. None of these documents qualifies for the exception found in § 554.2725(2). Further, to the extent that the plaintiffs argue that the two-year warranty on workmanship and materials referenced in Acorn's advertising brochure or any express warranty for future performance in the written contract between Nabholz and Acorn are unreasonable, the court finds that argument without merit. Even if that argument was considered, the two years would work to extend the warranty past 1998, when the plaintiffs allege they first discovered the defect, until 2000. Further, R.J. Kenney has stated that a one-year warranty was standard in 1987-88 so two years would not be unreasonable.

Because the hotel was completed in 1988, any alleged breach of warranty or breach of contract would have occurred prior to that. Therefore, at the latest, the statute of limitations would have run on a breach of implied warranty claim and breach of oral contract in 1993 and for the breach of express warranty claim and breach of written contract claim in 1998. The court will assume that there was an express warranty and that the plaintiffs sufficiently proved the terms of a written contract with Acorn and Nabholz through multiple documents from Swanson Glass so that the ten-year statute of limitations would apply to those claims.

This court must then determine whether the discovery rule applies in this case to extend the applicable statutes of limitation. The Iowa Supreme Court has recognized that there is strong authority disfavoring the application of the discovery rule to actions based on contract and express and implied warranties. See Brown v. Ellison, 304 N.W.2d at 201. The party pleading an exception to the normal limitations period has the burden to plead and prove the exceptions. Id. (citation omitted). This court will review the evidence in a light most favorable to the plaintiffs to determine whether they provided substantial evidence that they did not discover, and with reasonable diligence could not have discovered, that the windows were defective prior to 1998. It is undisputed that the windows in the Collins Plaza Hotel first began to leak sometime prior to 1991. Several hotel employees were aware of the leaks and of the many customer complaints regarding the leaks and the musty smell in the guest rooms. At least two repairs were made to the windows in 1991. These repairs were performed in approximately 85% of the windows in the Collins Plaza Hotel. According to R.J. Kenney, these repairs were similar in scope to repairs made on several other of the plaintiffs' hotel projects within that period of time, although the window manufacturers were not the same on these projects. The plaintiffs claim they had no knowledge of any of these repairs done to the windows in the early 1990s. However, Brian and Michael Kenney testified that they could not access the guest rooms to investigate without notifying hotel personnel and being given access to the rooms.

The plaintiffs' expert Gerald Fuller has testified that he performed heat testing on a window unit and observed that a certain amount of heat caused shrinkage. R.J. Kenney opined that "it wouldn't be surprising that some [of the windows] would leak right away." R.J. Kenney further opined that 10% of the damage caused by shrinkage of the sill receptor occurred during the period of 1988-1990, and 30% during the period of 1990-1993. R.J. Kenney further testified at his deposition as follows: "Q: But the reason for the repairs as you understand it at the Collins Plaza Hotel in that time frame [1990-1991] would have been to compensate for thermal break shrinkage problems for those windows? A: Definitely, yes."

The plaintiffs allege that they did not become aware of the full extent of the water intrusion problems at the Collins Plaza Hotel until 1998 when employees first noticed water infiltrating through the windows. The plaintiffs do not dispute that there were leaks in 1991, however, they argue that those leaks are of a different nature than what is at issue in this lawsuit. However, Iowa law is clear that the plaintiffs did not have to be aware of the "exact nature of the problem" that caused the damage in order for the statute of limitations to commence. See Roth v. G.D. Searle & Co., 27 F.3d at 1308 (stating that "under Iowa law, actual knowledge of a causal relationship is not required to begin the running of the statute of limitations."). The plaintiffs in 1991 were at least on inquiry notice to discover the cause and nature of the leaks.

The leaks in the early 1990s were not "isolated" events as the plaintiffs argue. There were not random leaks, rather, the record demonstrates that the windows leaked almost every time it rained. The leaks in the early 1990s caused several guests to complain of the smell in their rooms, there was mold in the rooms and bleach was used to clean it, and several repairs were done in 1991 to attempt to remedy the problem. These were hardly "isolated" incidents. The fact that approximately 85% of the hotel windows had repairs done to them triggered a duty to conduct a reasonably diligent investigation as to the cause of the problems. Even taking the evidence in a light most favorable to the plaintiffs, the court finds that they could have reasonably discovered the defects prior to 1998.

As the Iowa Supreme Court stated in Franzen, "[t]he period of limitations is the outer time limit for making the investigation and bringing the action. The period begins at the time the person is on inquiry notice." Ranney v. Parawax Co., Inc., 582 N.W.2d 152, 156 (Iowa 1998) (quoting Franzen v. Deere & Co., 377 N.W.2d at 662). It should also be pointed out that Iowa courts have been reluctant to adopt a broad application of the discovery rule for fear that creating rolling statute of limitations would effectively obliterate the intended protection of legislatively established time limits. See Borchard v. Anderson, 542 N.W.2d at 251. By 1991, at the latest, the plaintiffs had enough information to trigger their duty to investigate the cause and nature of the repeated water intrusion problems at

their hotel. This court concludes that the plaintiffs' situation does not trigger the application of the discovery rule so as to extend the statute of limitations for their claims for breach of warranty, breach of contract, negligence, strict liability, and negligent misrepresentation. These claims are therefore dismissed as time-barred. Accordingly, Acorn's claims for indemnity and contribution from Nabholz are also dismissed.

Upon the foregoing,

IT IS ORDERED that Acorn's August 4, 2003 motion for summary judgment (docket number 68) and Nabholz's August 4, 2003 motion for summary judgment (docket number 69) are granted. This case is dismissed. The Clerk of Court shall enter judgment accordingly.

October 15, 2003.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT